

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH RAY THOMAS,

Defendant-Appellant.

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UNPUBLISHED

January 20, 2011

No. 294789

Kent Circuit Court

LC No. 09-002487-FC

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Defendant Kenneth Thomas appeals as of right his jury conviction of first-degree premeditated murder.<sup>1</sup> The trial court sentenced Thomas to mandatory life imprisonment without parole. We affirm.

**I. FACTS**

Debra Jean VanKlaveren, the victim, was found dead on January 5, 2009, in her apartment. Asphyxia by manual strangulation was determined to be the cause of death. Billie Jo Lowry talked to VanKlaveren about rent money on January 2, 2009, outside VanKlaveren's apartment. VanKlaveren advised Lowry that she did not have the rent money that day. Lowry returned on Monday, January 5, 2009, but received no response when she knocked on VanKlaveren's door. Lowry then got permission from her supervisor and entered VanKlaveren's locked apartment using her own keys. From across the apartment, Lowry saw a person on the bed in the bedroom. Upon realizing that the person on the bed was VanKlaveren, Lowry left the apartment and contacted the police.

Thomas was staying with VanKlaveren in December 2008 and early January 2009. VanKlaveren's neighbor, David Badger, testified that he saw Thomas leave VanKlaveren's apartment on Saturday night, January 3, 2009. Badger observed Thomas lock VanKlaveren's apartment door and then drive away in VanKlaveren's car.

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<sup>1</sup> MCL 750.316.

On January 5, 2009, Thomas telephoned his brother for a ride. When Thomas got in his brother's car, he was high on crack cocaine and was speaking rapidly about numerous topics. Thomas told his brother, "I might have choked someone." His brother was upset and brought Thomas to their sister's home. Thomas then told his brother, his sister, and his brother-in-law that he did choke someone, that the person he choked still had a pulse, and that she was on a bed. Thomas demonstrated to them how he choked his victim, by placing both thumbs and fingers together with a circle in the center.

After his arrest, Thomas also allegedly confessed to his cellmate while incarcerated. Thomas told Christopher Eugene Cummings that he was smoking crack cocaine with VanKlaveren. She started pointing and telling him to look under the furniture for some crack cocaine that may have dropped. Cummings testified that Thomas said he then pushed VanKlaveren's hand away, punched her in the face, and choked her. Cummings testified that Thomas said "Deb" was the person he choked. Thomas said he left the apartment after he choked her, but that he later came back to take money from VanKlaveren and to take her dog so that no one would hear it barking. Thomas said that he moved VanKlaveren to the bed so it would look like she was asleep. Thomas now challenges his conviction on several grounds.

## II. CHALLENGING THE CONVICTION

### A. STANDARD OF REVIEW

Thomas argues that there was insufficient evidence to establish that he caused the death of VanKlaveren. Additionally, Thomas argues that the trial court should have granted his motion for a directed verdict regarding premeditation. When a defendant challenges the sufficiency of the evidence, a court must review the record de novo and view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proven beyond a reasonable doubt.<sup>2</sup> The standard of review for a directed verdict is the same as a challenge to the sufficiency of the evidence.<sup>3</sup>

### B. ANALYSIS

In order to convict Thomas of first-degree premeditated murder, the prosecution had to prove that Thomas intentionally killed VanKlaveren and that his acts were done with premeditation and deliberation.<sup>4</sup>

Thomas challenges the evidence establishing that VanKlaveren died of strangulation and argues that the evidence supports a conclusion that she died of a cocaine overdose. This argument has no merit. The forensic pathologist who performed the autopsy determined that the

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<sup>2</sup> *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

<sup>3</sup> *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

<sup>4</sup> *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002).

cause of death was manual strangulation. The pathologist based his conclusion on the facts that VanKlaveren had bruising on her neck and that the decomposition around her head and neck suggested a large amount of blood was trapped in the area, which is consistent with strangulation. Additionally, VanKlaveren's hyoid bone, a small bone in the neck that is likely to break during manual strangulation, was broken. Finally, the pathologist recognized that although there was a significant level of cocaine in VanKlaveren's system, he found no indication of a cocaine-induced heart attack or any other natural cause of death.

Thomas also argues that there was insufficient forensic evidence linking him to the crime and that the police should have performed DNA analysis and matched the unmatched fingerprints discovered at the scene. However, forensic evidence is not necessary to show that there was sufficient evidence to find Thomas guilty beyond a reasonable doubt. Thomas's argument that police officers should have conducted DNA analysis is also meritless because police have no duty to assist in developing potentially exculpatory evidence, and they have no duty to perform any particular tests.<sup>5</sup> Thomas confessed to multiple people, was seen leaving VanKlaveren's apartment on the night later determined to be close to the time of the murder, and was later driving VanKlaveren's car. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to find Thomas guilty beyond a reasonable doubt.

Alternatively, Thomas argues that there is not sufficient evidence of premeditation. Premeditation means "to think about beforehand."<sup>6</sup> There is no specific time requirement for premeditation, but sufficient time must have elapsed "to allow the defendant to take a second look."<sup>7</sup> The relationship between the defendant and the victim, the defendant's conduct before and after the crime, and the circumstances of the killing itself may all be considered when determining whether the defendant acted with premeditation.<sup>8</sup>

"Circumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of premeditation and deliberation."<sup>9</sup> Evidence of manual strangulation can be used as evidence that the defendant had an opportunity to take a "second look."<sup>10</sup> According to Thomas's own confession, he first punched VanKlaveren and then strangled her; thus, the time it took for Thomas to punch and strangle VanKlaveren afforded him opportunity to take a second look. Additionally, Thomas's attempt to conceal the killing is also relevant evidence of premeditation.<sup>11</sup> The evidence and reasonable inferences supported that Thomas placed VanKlaveren on the bed to look like she was sleeping, he took VanKlaveren's

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<sup>5</sup> *People v Anstey*, 476 Mich 436, 460-462; 719 NW2d 579 (2006).

<sup>6</sup> *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998).

<sup>7</sup> *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

<sup>8</sup> *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008).

<sup>9</sup> *Id.*

<sup>10</sup> *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003).

<sup>11</sup> *Id.*

dog so no one would be alerted of a problem because of barking, and he locked VanKlaveren's apartment door. Thomas also stole money from VanKlaveren and took her car after killing her, leading to a reasonable inference suggesting that Thomas planned the murder in order to obtain money and the car.<sup>12</sup> In sum, we conclude that the trial court properly denied the directed verdict because there was sufficient evidence, viewed in a light most favorable to the prosecution, for a rational jury to find Thomas guilty beyond a reasonable doubt of first-degree premeditated murder.

### III. RIGHT TO PRESENT A DEFENSE

#### A. STANDARD OF REVIEW

Thomas argues that several of the trial court's evidentiary rulings denied him the right to present a defense. Thomas did not object on the basis of his right to present a defense at trial; thus, the issue is not properly preserved. We therefore review Thomas's unpreserved claim for plain error.<sup>13</sup> Under the plain error standard, the defendant must show that an error occurred, that the error was plain, and that the plain error affected substantial rights.<sup>14</sup> An error is plain when it is clear and obvious.<sup>15</sup> The error affects substantial rights when the defendant is prejudiced, meaning the error affected the outcome of the trial.<sup>16</sup>

A defendant has a constitutional right to present a defense.<sup>17</sup> However, the right is not absolute, and a defendant must still comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."<sup>18</sup> The right to present a defense "extends only to relevant and admissible evidence."<sup>19</sup>

#### B. WITNESS QUESTIONING

During the trial, Thomas wanted to question his brother regarding his brother's personal belief about Thomas's reliability while high on crack cocaine and regarding Thomas's capacity for violence. The trial court sustained an objection to the testimony and found that the personal beliefs of Thomas's brother were not relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more

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<sup>12</sup> See *Plummer*, 229 Mich App at 301.

<sup>13</sup> *People v Carines*, 460 Mich 750, 763, 764; 597 NW2d 130 (1999).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

<sup>18</sup> *Id.* (quotations and citations omitted).

<sup>19</sup> *People v Likine*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2010), citing *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984).

probable or less probable than it would be without the evidence.”<sup>20</sup> The trial court did not plainly err when making the evidentiary decision to exclude the personal feelings of Thomas’s brother. Whether Thomas’s brother personally believed Thomas’s confession is irrelevant to whether Thomas actually choked VanKlaveren, and is therefore not admissible evidence.<sup>21</sup>

### C. ADMISSION OF EVIDENCE REGARDING PRIOR INCIDENT

Thomas challenges the trial court’s limitation on his development of evidence regarding a December 16, 2008 destruction of property incident at VanKlaveren’s apartment.

The trial court did not plainly err when it determined that the contents of the police report related to the incident were inadmissible hearsay and found that testimony regarding the incident relied on facts not in evidence. Police reports are hearsay and do not fall within any hearsay exception when the reports contain observations made at the scene of a crime or while investigating a crime.<sup>22</sup> Additionally, questions or arguments relying on facts not in evidence are improper.<sup>23</sup> The facts of the property destruction incident were not in evidence; thus, the trial court properly prohibited Thomas from asking questions that relied on the facts of that incident. Additionally, Thomas’s right to present a defense extends only to the right to present “relevant and admissible evidence.”<sup>24</sup> The trial court properly found that the evidence Thomas wished to solicit—evidence regarding the police report and facts behind the destruction of property incident—was inadmissible. Further, Thomas cannot show that the trial court’s decision to exclude additional development of the facts of the destruction of property incident affected his substantial rights. The court still permitted Thomas to point to the incident itself and make the arguments in closing that someone else had a motive to murder VanKlaveren. Thus, the trial court’s decision did not preclude Thomas from presenting his defense and did not affect Thomas’s substantial rights.<sup>25</sup>

### D. ADDITIONAL TIME TO REVIEW EVIDENCE

Thomas challenges the trial court’s ruling regarding his request for additional time to review fingerprint cards and photographs of VanKlaveren’s apartment. Discovery in a criminal case is within the discretion of the trial court.<sup>26</sup> The trial court did not abuse its discretion when it declined to call a recess during trial and make immediate copies of the fingerprint cards and photographs for Thomas. Instead, the trial court provided defense counsel with time to review

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<sup>20</sup> *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004), quoting MRE 401.

<sup>21</sup> MRE 401; MRE 402.

<sup>22</sup> *People v McDaniel*, 469 Mich 409, 413; 670 NW2d 659 (2003).

<sup>23</sup> *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

<sup>24</sup> *Hackett*, 421 Mich at 354.

<sup>25</sup> *Carines*, 460 Mich at 763.

<sup>26</sup> *People v Lemcool*, 445 Mich 491, 498; 518 NW2d 437 (1994).

the cards during trial in lieu of making copies, and defense counsel accepted that solution. Where a defendant expresses satisfaction with a trial court decision, an issue challenging that decision is waived and the defendant may not seek appellate review.<sup>27</sup> The trial court's evidentiary decision regarding the photographs was not an abuse of discretion because defense counsel had all the photographs before trial and was familiar with the images. Defense counsel simply did not have printed copies. Thomas was able to introduce any photograph it requested during trial, and defense counsel was able to effectively cross-examine the witness. Thus, the trial court's decision did not impinge upon Thomas's right to present a defense.

#### E. SCOPE OF CROSS-EXAMINATION

Thomas challenges the trial court's ruling that his questions to the detective about DNA testing of VanKlaveren's fingernails were outside the scope of his recross examination and impermissible. Evidentiary rules permit the court to limit cross-examination to matters testified to on direct examination.<sup>28</sup> Because the prosecution explored no issue related to collection of fingernails for DNA testing during redirect examination, the trial court did not abuse its discretion when it limited Thomas's questions about DNA tests.<sup>29</sup>

#### F. ARGUMENT TO JURY

Thomas argues that he should have been permitted to discuss the discovery problems leading up to the trial in front of the jury. "A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct."<sup>30</sup> The trial court properly limited the information to which the jurors were exposed in order to ensure that the jurors' ability to make an impartial decision was not impaired.<sup>31</sup>

#### G. CONCLUSION

In sum, none of the trial court's evidentiary rulings deprived Thomas of the right to present a defense. Thomas cannot show that any of the trial court's rulings affected his substantial rights; thus, Thomas's right to present a defense was not violated.

#### IV. CUMULATIVE EFFECT

Thomas argues that the cumulative trial errors amounted to a deprivation of his right to a fair trial. Thomas did not preserve the issue by making a cumulative error objection before the

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<sup>27</sup> *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000).

<sup>28</sup> MRE 611(c).

<sup>29</sup> *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995) ("Whether a trial court has properly limited cross-examination is reviewed for an abuse of discretion.").

<sup>30</sup> *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

<sup>31</sup> MCR 6.414(B).

trial court; thus, we review Thomas's claim for plain error affecting substantial rights.<sup>32</sup> Thomas argues that the contentious nature of the trial, combined with the lack of evidence and the limits on his right to present a defense combine to create cumulative error requiring reversal. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal."<sup>33</sup> In order to reverse based on cumulative error, the errors "must be of consequence."<sup>34</sup> Thus, the effect of the errors must "have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial."<sup>35</sup>

In this case, the evidence was sufficient to convict Thomas, and the rules of evidence and procedure justified claimed barriers to his right to present a defense. Neither of those errors can be combined with any others to create a valid cumulative error argument. Additionally, Thomas has not identified any specific conflicts occurring during trial that, standing alone or combined with any others, were of consequence and require reversal. There are no errors to accumulate, and when no errors are found, "a cumulative effect of errors is incapable of being found."<sup>36</sup>

## V. EFFECTIVE ASSISTANCE OF COUNSEL

### A. STANDARD OF REVIEW

Thomas argues that his counsel was ineffective. Thomas did not properly preserve his ineffective assistance of counsel claim, and we review unpreserved claims of ineffective assistance of counsel for errors apparent on the record.<sup>37</sup>

In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that trial counsel's performance fell below an objective standard of reasonableness and that the deficiency so prejudiced the defendant as to deprive him of a fair trial.<sup>38</sup> In order to show deficiency, a defendant must show that "counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment."<sup>39</sup> To demonstrate prejudice, a defendant must show a "reasonable probability that, but for counsel's error, the result of the proceeding would have been different."<sup>40</sup>

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<sup>32</sup> *Carines*, 460 Mich at 763.

<sup>33</sup> *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

<sup>37</sup> *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

<sup>38</sup> *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994).

<sup>39</sup> *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

<sup>40</sup> *Id.* at 694.

## B. GUILTY PLEAS

Thomas claims that trial counsel was deficient because counsel advised Thomas to plead guilty to two unrelated impeachable felonies before the trial, and, as a result, Thomas did not testify. There is no evidence in the record that establishes that defense counsel recommended that Thomas plead guilty to the other felonies; thus, Thomas has failed to establish the necessary factual predicate for his claim of ineffective assistance of counsel.<sup>41</sup> Similarly, Thomas has not established a factual predicate for his claim that trial counsel was ineffective because trial counsel suggested the prosecution's case was stronger than the defense. Because Thomas has not established a factual predicate for his claim, the challenged performance cannot be found to be ineffective.<sup>42</sup>

## C. FAILURE TO ADEQUATELY REVIEW EVIDENCE

Thomas argues that trial counsel was ineffective because counsel failed to adequately review photographs and fingerprint evidence before trial. A failure to reasonably investigate a case can constitute a deficiency amounting to ineffective assistance of counsel.<sup>43</sup> Even assuming, however, that trial counsel was deficient in his lack of preparation, Thomas has not shown that the alleged deficiency prejudiced his case. Trial counsel was familiar with the fingerprint evidence and the photographs and was able to cross-examine relevant witnesses with the evidence and photographs during trial. Additionally, the key evidence incriminating Thomas was unrelated to the fingerprint and photograph evidence.

Thomas also argues that trial counsel was deficient because he failed to review and investigate the possibility of suppressing evidence gathered from VanKlaveren's apartment. The trial record does not conclusively establish whether police ever obtained a warrant for the search; thus, Thomas's claim that there was a possible suppression issue has merit. However, even if the police did not have a warrant, the initial search of the apartment was justified under the emergency-aid exception, which permits police investigating a situation to enter a residence without a warrant when police "reasonably believe someone is in need of immediate aid[.]"<sup>44</sup> The emergency-aid exception permitted officers to seize the body of VanKlaveren and any other evidence in plain view.<sup>45</sup> The primary evidence against Thomas was the evidence obtained from the autopsy of VanKlaveren's body regarding her injuries and cause of death. Thus, even if there was no warrant obtained, the evidence that strongly linked Thomas to VanKlaveren's murder fell within an exception to the warrant requirement and would not have been suppressed. Thomas has not established that he was prejudiced as a result of any deficiency by his counsel. Thus, Thomas has not met his burden to establish that trial counsel was ineffective.

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<sup>41</sup> *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004).

<sup>42</sup> *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

<sup>43</sup> *People v Grant*, 470 Mich 477, 490-491; 684 NW2d 686 (2004).

<sup>44</sup> *People v Davis*, 442 Mich 1, 25; 497 NW2d 910 (1993).

<sup>45</sup> *Id.*



#### D. FAILURE TO REQUEST POST-TRIAL RELIEF

Thomas argues that trial counsel was deficient because counsel failed to request any relief in a post-trial motion. We disagree. After trial, Thomas filed “Additional Trial Objections,” which were merely a reiteration of objections already addressed during trial. “Trial counsel is not required to advocate a meritless position,” and the post-trial objections did not contain any position that warranted a request for relief.<sup>46</sup>

We affirm.

/s/ David H. Sawyer  
/s/ William C. Whitbeck  
/s/ Kurtis T. Wilder

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<sup>46</sup> *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).